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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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NOV 12 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re application of

MOBILE TELECOMMUNICATION TECHNOLOGIES  
CORP.For a Nationwide Narrowband PCS License Following  
Award of Pioneer's Preference

In the matters of

Amendment of the Commission's Rules to Establish New  
Narrowband Personal Communications ServicesImplementation of Sections 3(n) and 332 of the Com-  
munications ActImplementation of Section 309(j) of the Communications  
Act -- Competitive Bidding

Review of the Pioneer's Preference Rules

File No. \_\_\_\_\_

93-266

Gen. Docket No. 90-314

ET Docket No. ~~90-314~~

File No. PP-37

Gen. Docket No. 93-252

PP Docket No. 93-253

ET Docket No. 93-266

To: The Commission

**EMERGENCY MOTION TO RETURN MTEL APPLICATION**

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November 12, 1993

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## **Table of Contents**

<b>SUMMARY .....</b>	<b>2</b>
<b>BACKGROUND .....</b>	<b>3</b>
<b>DISCUSSION .....</b>	<b>5</b>
<b>I. THE COMMISSION MUST RETURN THE MTEL APPLICATION SUMMARILY .....</b>	<b>5</b>
<b>A. There Are No Rules For Acceptance Of Narrowband PCS Applica-         tions, And Thus Mtel's Application Cannot Be Entertained .....</b>	<b>6</b>
<b>B. Even If Mtel's Application Could Be Entertained, It Would Have To         Be Dismissed .....</b>	<b>7</b>
1. Mtel's Waiver Request Lacks Any Merit .....	7
2. Mtel's Application Is Not Acceptable For Filing .....	8
3. Acceptance of Mtel's Application Would Violate The Commission's Decision Not To Give Mtel A Headstart .....	10
<b>II. CONSIDERATION OF THE APPLICATION WILL PREJUDGE THE PENDING RULEMAKING PROCEEDINGS .....</b>	<b>11</b>
<b>CONCLUSION .....</b>	<b>13</b>

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To: The Commission

File No. \_\_\_\_\_

Gen. Docket No. 90-314  
ET Docket No. 92-100  
File No. PP-37

Gen. Docket No. 93-252

PP Docket No. 93-253

ET Docket No. 93-266

**EMERGENCY MOTION TO RETURN MTEL APPLICATION**

BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corporation, and Mobile Communications Corporation of America (collectively, "BellSouth"), by their attorneys, hereby move for the return of the application for a nationwide Narrowband PCS license filed on October 29, 1993 by Mobile Telecommuni-  
cation Technologies Corporation ("Mtel"), the sole Narrowband pioneer's preference  
awardee.

## **SUMMARY**

**Mtel cannot pretend that the filing and processing of its application is business as usual. Every aspect of the Narrowband PCS service is in flux: The rules adopted for the service have already been rewritten, within months of their adoption; the rules and policies have been challenged both on reconsideration and in court; and the Commission has expressly reserved judgment on how to classify and license this service until further rulemakings are completed. Moreover, the pioneer's preference award to Mtel is far from final: BellSouth has appealed the award; petitioners have sought reconsideration of the pioneer's preference decision; and the Commission is considering the elimination of the pioneer's preference policy itself.**

**Mtel's application is patently defective and must be returned. It was filed under a rule part that is neither completed nor effective. Mtel asks the Commission to apply rules from another rule part or from pending rulemaking proposals. In the alternative, it asks for a blanket waiver of all existing and proposed rules that stand in the way of its application. In essence, Mtel has asked the Commission to apply no standards to Mtel, or, in the alternative, to prejudge the pending rulemakings. This could only occur if the Commission were to disregard the rule of law entirely.**

**Immediate return of the application is essential. Any processing of the application will prejudice all of the captioned proceedings. Mtel must await an opportunity to file an application for the Narrowband PCS frequencies like every other applicant, because the Commission specifically refused to award it a headstart.**

## BACKGROUND

On July 23, 1993, the Commission issued its *First Report and Order* in the PCS dockets (Gen. Docket 90-314 and ET Docket 92-100).<sup>1/</sup> The decision established rules for Narrowband PCS. It also granted a pioneer's preference to Mtel. BellSouth has appealed the Mtel preference award. Another party also sought judicial review of the rules adopted.<sup>2/</sup> In addition, several parties petitioned for reconsideration of the *First Report and Order*. These petitions address the rules adopted, the disposition of the preference requests, and the way applications by preference winners will be processed.

Before the *First Report and Order* was adopted, the House had passed legislation that included amendments to the Communications Act regarding the selection of licensees through competitive bidding and reclassification of private and common carrier mobile service providers to ensure regulatory parity. The Senate had not yet acted, however, so the Commission found it could not determine either how Narrowband PCS licensees would be classified or how future Narrowband PCS applications should be processed. Accordingly, in the *First Report and Order*, the Commission stated that further rules would be required for processing applications, after the legislation was enacted:

Issues regarding licensee selection procedures and the regulatory status of the service are the subject of legislation activity being considered by the Congress and will be addressed by the Commission in a further action.<sup>3/</sup>

The statutory amendments later became law on August 10, 1993 as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107

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<sup>1/</sup> *New Narrowband Personal Communications Services*, Gen. Docket 90-314 and ET Docket 92-100, *First Report and Order*, FCC 93-329, 8 FCC Rcd. \_\_\_\_, 73 Rad. Reg. 2d (P&F) 435 (1993), *pets. for recon. pending, appeals docketed sub nom. BellSouth Corp. v. FCC*, No. 93-1518 (D.C. Cir. filed Aug. 20, 1993).

<sup>2/</sup> See note 1, *supra*.

<sup>3/</sup> *First Report and Order*, 73 Rad. Reg. 2d (P&F) at 437.

Stat. 387 (Aug. 10, 1993). Auctions are now the licensing technique for all applications filed to provide paid services to subscribers, and mobile service providers are now to be classified as "private" and "commercial." As required by the law, the Commission has initiated two rulemaking proceedings. In Gen. Docket 93-252, the Commission proposes to carry out the reclassification of the mobile services into private and commercial mobile services.<sup>4/</sup> In PP Docket 93-253, the Commission proposes to issue licenses through a system of competitive bidding.<sup>5/</sup>

Two other proceedings are relevant. In Gen. Docket 90-314, the Commission has adopted a *Second Report and Order*.<sup>6/</sup> This decision principally adopts rules for Wideband PCS. In addition, it amends and recodifies the rules for Narrowband PCS that were adopted in the *First Report and Order*. Finally, in ET Docket 93-266, the Commission proposes to repeal or amend its pioneer's preference rules and policies, in light of the new legislation.<sup>7/</sup> Finally, the Commission has indicated that it is holding in abeyance its rewrite of Part 22, the rules under which Mtel purportedly filed its application, until many of these proceedings have been concluded.

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<sup>4/</sup> *Implementation of Sections 3(n) and 332 of the Communications Act*, Gen. Docket 93-252, *Notice of Proposed Rulemaking*, FCC 93-454 (Oct. 8, 1993). Comments were filed November 8, 1993, and replies are due November 23, 1993.

<sup>5/</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket 93-253, *Notice of Proposed Rulemaking*, FCC 93-455 (Oct. 12, 1993). Comments were filed November 10, 1993, and replies are due November 24, 1993.

<sup>6/</sup> *New Personal Communications Services*, Gen. Docket 90-314, *Second Report and Order*, FCC 93-451 (Oct. 22, 1993). Petitions for reconsideration of this decision are due December 8, 1993.

<sup>7/</sup> *Review of the Pioneer's Preference Rules*, ET Docket 93-266, *Notice of Proposed Rulemaking*, FCC 93-477 (Oct. 21, 1993). Comments are due November 15, 1993, and replies are due November 22, 1993.

## DISCUSSION

In the proceeding to repeal or amend the pioneer's preference policy, Docket 93-266, the Commission said it was giving serious consideration to petitions that called for Mtel to pay an auction price for its Narrowband PCS license.<sup>9/</sup> One week later, Mtel filed an application for a nationwide Narrowband PCS channel -- a transparent attempt to avoid the effect of the auction statute and the Commission's rules. Moreover, by filing immediately after the beginning of the pioneer's preference, auction, and regulatory classification rulemakings, Mtel is seeking to achieve an end run around these rulemakings, to protect its pioneer's preference against the pending petitions for reconsideration and the new pioneer's preference rulemaking. Comments are due to be filed in the latter proceeding on November 15, 1993.

Mtel filed its application on October 29, 1993, despite the unfinished state of the rules for Narrowband PCS and the fact that the application process has not begun. Mtel did not serve a copy of its filing on BellSouth, which is a party to the FCC's restricted adjudicatory proceeding on Mtel's pioneer's preference and has appealed the award. Instead, Mtel filed its application *ex parte*. Moreover, Mtel omitted any mention of the application from its comments in Docket 93-252, which were filed on November 8.

### **I. THE COMMISSION MUST RETURN THE MTEL APPLICATION SUMMARILY**

The Mtel application must be returned because the Commission has adopted no rules for processing Narrowband PCS applications. The application is blatantly devious, in any event, and is therefore unacceptable for filing.

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<sup>9/</sup> *Id.* at ¶ 10 n.12.

**A. There Are No Rules For Acceptance Of Narrowband PCS Applications, And Thus Mtel's Application Cannot Be Entertained**

The Commission's rules do not currently permit the filing or acceptance of Narrowband PCS applications. Mtel filed the application before the Commission has adopted any criteria for the processing of applications.<sup>9/</sup> No application filing date has been announced. Moreover, the following essential rules for the filing, acceptance, and processing of Narrowband PCS applications have not yet been adopted and, in fact, are under consideration in pending proceedings:<sup>10/</sup>

- Classification of service as private or commercial mobile service
- Determination of which Bureau has delegated authority to act on applications
- Acceptability for filing requirements (e.g., financial showing, coverage and construction schedule, cities to be served by nationwide systems)
- Basic qualifications and eligibility criteria
- Application form and content (e.g., form to be used, information that must be supplied)
- Application filings (e.g., where applications are to be filed, how many copies must be filed, filing fees, when applications may be filed)
- Application processing (e.g., assignment of file numbers, order of processing, permissibility of amendments)
- Application review and public notice of acceptability
- Petitions to deny and responsive pleadings

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<sup>9/</sup> In the *First Report and Order*, when the Commission adopted its rules for Narrowband PCS, it adopted only the technical framework for this service. The Commission acknowledged that its rules and policies were incomplete. In the *First Report and Order*, it said:

The regulatory plan we are adopting for narrowband PCS includes an allocation of spectrum, a flexible regulatory structure, and technical and operational rules. Issues regarding licensee selection procedures and the regulatory status of the service are the subject of legislation activity being considered by the Congress and will be addressed by the Commission in a further action.

*First Report and Order*, 73 Rad. Reg. 2d (P&F) at 437.

<sup>10/</sup> E.g., *NPRM*, PP Docket No. 93-253, FCC 93-455 at ¶¶ 94-99 & nn.84-88.



Mtel filed its application *knowing that these rules do not yet exist!* Mtel attempts to get around this problem by inventing a set of rules that it hopes the Commission will apply, thus obviating the need for a waiver. Thus, it pretends its application is subject to the rules in Part 22 and the rules that are "under development by the Commission."<sup>11/</sup>

However, the Part 22 rules do not apply to Narrowband PCS frequencies. Part 99, which has not been completed, governs. But the Administrative Procedure Act ("APA")<sup>12/</sup> does not give any legal force to rules that have merely been proposed or are "under development" in pending rulemakings. Mtel forgets that the Commission must make a public interest finding to adopt rules, and can only apply those rules after they have been promulgated in accordance with the APA and published in the Federal Register. At that point, of course, the rules apply to all, not only to Mtel.

**B. Even If Mtel's Application Could Be Entertained, It Would Have To Be Dismissed**

**1. Mtel's Waiver Request Lacks Any Merit**

Recognizing that the lack of rules might be more than a minor obstacle, Mtel requested a blanket waiver of "any existing or proposed rules . . . necessary to allow processing and grant of its application."<sup>13/</sup> Mtel's waiver request is blatantly defective and makes a mockery of the Commission's application processing.

Remarkably, Mtel cites as dispositive support for its waiver request the D.C. Circuit's decisions in *Northeast Cellular Telephone Co. v. FCC*,<sup>14/</sup> and *WAIT Radio v.*

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<sup>11/</sup> Mtel Application, Exhibit 1 at 5, 6.

<sup>12/</sup> 5 U.S.C. § 553 *et seq.*

<sup>13/</sup> Mtel Application, Exhibit 1 at 7 n.16.

<sup>14/</sup> 897 F.2d 1164 (D.C. Cir. 1990).

FCC.<sup>15/</sup> In *WAIT Radio*, the landmark waiver case, the court remanded an FCC grant of a waiver, stating:

*Sound administrative procedure contemplates waivers, or exceptions granted only pursuant to a relevant standard -- expressed at least in decisions accompanied by published opinions, especially during a period when an approach is in formation, but best expressed in a rule that obviates discriminatory approaches. The agency may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory function. The process viewed as a whole leads to a general rule, and limited waivers or exceptions granted pursuant to an appropriate general standard. This combination of a general rule and limitations is the very stuff of the rule of law . . . .*<sup>16/</sup>

In *Northeast*, which heavily relied on *WAIT Radio*, the court vacated and remanded an FCC grant of waiver because the agency did not follow an "articulable standard." The court described such a waiver as "outrageous, unpredictable and unworkable policy that is susceptible to discriminatory application."<sup>17/</sup>

BellSouth agrees that the *WAIT Radio* and *Northeast* cases are dispositive: They require summary return of the application. The rules are still being formulated, and the policies underlying those rules are yet to be determined. Thus, there is no rule to waive, nor any "articulable standard" by which a waiver can be measured.

## **2. Mtel's Application Is Not Acceptable For Filing**

Assuming arguendo that the Mtel application could be considered, it must be dismissed as unacceptable for filing. The Commission's *only* rule in Part 99 pertaining to acceptability for filing reads as follows: "Applications for individual sites are not

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<sup>15/</sup> 418 F.2d 1153 (D.C Cir. 1969).

<sup>16/</sup> 418 F.2d at 1159 (footnote omitted)(emphasis supplied).

<sup>17/</sup> 897 F.2d at 1164.

needed *and will not be accepted.*"<sup>19/</sup> Despite the plain language of this rule, Mtel's application is for a single individual site: 901 Main Street, in Dallas, Texas.<sup>19/</sup> By the very terms of the rule, the application cannot be accepted for filing.

Mtel predicates its application on its pioneer's preference award,<sup>20/</sup> yet it deviates very substantially from the technology on which the preference was awarded. Mtel's application does not even mention the exotic modulation, access, and location schemes that were the basis for its pioneer's preference. It does not even propose two-way communications: no mobile transmitters are proposed, only receivers<sup>21/</sup> that it describes as "passive."<sup>22/</sup> The "Nationwide Messaging Network" for which it has applied is entirely different from the one in the pioneer's preference proceeding. In fact, Mtel has filed an application for a garden-variety Part 22 nationwide paging application using the new Part 99 frequencies. Accordingly, Mtel's plea for special consideration because "Mtel is uniquely situated as a pioneer's preference recipient"<sup>23/</sup> rings hollow.

If Mtel's application remains on file, the Commission cannot lawfully prevent others from filing. If recent history is instructive, the Commission can anticipate massive filings by speculative applicants seeking to take advantage of the absence of any rules.

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<sup>19/</sup> 47 C.F.R. § 99.11 (*emphasis supplied*), as amended in *Second Report and Order*, Appendix A at 20.

<sup>19/</sup> Mtel Application, FCC Form 401, Schedule B, item 27(a). *See also* Exhibit 1 at 6.

<sup>20/</sup> Mtel Application, Exhibit 1 at 2-5.

<sup>21/</sup> *See* Mtel Application, FCC Form 401, Schedule B at item 33(j)(1).

<sup>22/</sup> *Id.*, Exhibit 1 at 6 n.15.

<sup>23/</sup> Mtel Application, Exhibit 1 at 7 n.16.

For that reason, the Commission should make clear that it does not permit the filing of applications until the rules have been completed.

Based on the foregoing, the Commission may not accept Mtel's filing and should return it forthwith.

**3. Acceptance of Mtel's Application Would Violate The Commission's Decision Not To Give Mtel A Headstart**

Finally, acceptance of Mtel's application at this time would violate the Commission's pioneer's preference policy. In the *Pioneer's Preference Rulemaking*, the Commission was urged to grant the preference awardee a substantial headstart over other applicants, in addition to guaranteeing a license. The Commission rejected this position:

We have further decided not to provide a headstart for the pioneering entity beyond the *de facto* headstart that may occur due to the time it may take other entities to apply for and receive a license.<sup>6</sup> The commenting parties have convinced us that no additional headstart is necessary.

<sup>6</sup> In order to ensure that any headstart as a result of a license grant based on a pioneer's preference is limited, we anticipate acting expeditiously on these other applications.<sup>24/</sup>

Once the Narrowband PCS rules are in place, Mtel and other Narrowband applicants will be able to file at the same time and be judged against uniform acceptability, basic qualifying, and eligibility standards. The only headstart that Mtel *might* receive is that it *may* be issued a license without the delays caused by the selection process for mutually exclusive applicants (assuming its pioneer's preference is not set aside on reconsideration, overturned on appeal, or eliminated as a result of the pioneer's preference rulemaking).

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<sup>24/</sup> *Pioneer's Preference Rulemaking*, Gen. Docket 90-217, *Report and Order*, 6 FCC Rcd. 3488, 3492 & n.6 (1991), *recon. in part*, 7 FCC Rcd. 1808 (1992), *further recon. denied*, 8 FCC Rcd. 1659 (1993).

For the foregoing reasons, and as set forth in Section II, below, the Mtel application should be returned summarily.

## **II. CONSIDERATION OF THE APPLICATION WILL PREJUDGE THE PENDING RULEMAKING PROCEEDINGS**

An additional reason for returning the application is that its consideration would prejudice the pending rulemakings in Dockets 93-252 and 93-253. Although Mtel filed a Part 22 common carrier application, it argued in Docket 93-252 that an applicant should not be permitted to self-select its regulatory status.<sup>25/</sup> Mtel did exactly what it says should not be permitted. The Commission has made clear that the regulatory status of all PCS services has yet to be determined.<sup>26/</sup> By allowing this application to remain on file, the Commission will prejudice its decision on how Narrowband PCS should be classified.

If the Commission processes the application, it will prejudice the auction rulemaking, which will establish procedures for processing PCS applications. Furthermore, the rules adopted in the *First Report and Order* may well change on reconsideration.<sup>27/</sup> *Even Mtel asked that the rules be changed.*<sup>28/</sup> Mtel should not be permitted to have its application considered under rules that will apply to no other party.

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<sup>25/</sup> Comments of Mobile Telecommunication Technologies Corp., Gen. Docket 93-252, at 11 (Nov. 8, 1993).

<sup>26/</sup> *NPRM*, Gen. Docket No. 93-252, FCC 93-454 at ¶ 44.

<sup>27/</sup> In the *Second Report and Order*, the Commission changed substantially the rules adopted in the *First Report and Order*. The *Second Report and Order* states that these changes were merely a reorganization, and not substantive. FCC 93-451 at n.146. To the contrary, the Commission eliminated numerous references to the Private Radio Bureau rules appearing in the prior version. *E.g., compare* § 99.10 in the two decisions.

<sup>28/</sup> See Mtel's Petition for Clarification or Partial Reconsideration, Gen. Docket 90-314 and ET Docket 92-100 (filed Sept. 10, 1993).

Moreover, the petitions for reconsideration raise significant questions about the pioneer's preference award. For example, Pacific Bell, Pagemart, and PageNet filed petitions asking the Commission to require Mtel to participate in an auction instead of filing an application free of mutually-exclusive competition.<sup>29/</sup> Retaining the application on file at this time would irreparably prejudice consideration of these petitions.

BellSouth will show in its comments in Docket 93-266 that in order to carry out the statutory objectives set by the auction statute, the Commission must eliminate the current pioneer's preference scheme. In particular, the Commission must take into account the interest of the public in recovering some of the value of the spectrum and avoiding unjust enrichment.<sup>30/</sup> The Commission also is required to consider diversification and reducing concentration of services.<sup>31/</sup> Yet Mtel, a major nationwide paging operator with two channels, is now seeking an additional nationwide 50 kHz, which will double its bandwidth. BellSouth's comments in the rulemaking will elaborate further on how the continuation of the pioneer's preference policy -- including applying it in the Narrowband PCS area -- will contravene the statute. Consideration of Mtel's application at this time will clearly prejudice the outcome of Docket 93-266.

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<sup>29/</sup> See Pacific Bell, Petition for Clarification, Gen. Docket 90-314 and ET Docket 92-100 (filed Sept. 10, 1993); Pagemart, Inc., Petition for Reconsideration of Pagemart (filed Sept. 10, 1993); Paging Network, Inc., Petition for Reconsideration and Clarification (filed Sept. 10, 1993).

<sup>30/</sup> 47 U.S.C. § 309(j)(3)(C).


<sup>31/</sup> 47 U.S.C. § 309(j)(3)(B).

## CONCLUSION

BellSouth submits that the Mtel application must be summarily returned for the reasons stated above.

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November 12, 1993

**Certificate of Service**

I, Mary Jane Adcock, hereby certify that on this 12th day of November, 1993, copies of the foregoing "Emergency Motion to Return Mtel Application" were sent via First Class United States mail, postage prepaid, to the following:

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